United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

75-7161

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

B P/S

BOSTON M. CHANCE, LOUIS C. MERCADO, et al.,

Plaintiffs-Appellees,

-against-

THE BOARD OF EXAMINERS, et al.,

Defendants,

-and-

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Defendant-Appellant,

-and-

COUNCIL OF SUPERVISORS AND ADMINISTRATORS OF THE CITY OF NEW YORK, LOCAL 1, SASOC, AFL-CIO,

Intervenor-Appellant.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF AMICUS CURIAE
NEW YORK CITY SCHOOL BOARDS ASSOCIATION, INC.

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BRIEF OF AMICUS CURIAE NEW YORK CITY SCHOOL BOARDS ASSOCIATION, INC.

PRELIMINARY STATEMENT

Amicus curiae New York City School Boards Association (the "Association") is a non-profit corporation whose member-

ship consists of the vast majority of the Community School Boards which were created as independent entities by N.Y. Ed. Law Art. 52-A and vested with basic operational authority over elementary and junior high schools in New York City. The Community School Boards represented by amicus curiae cover all geographic areas of the city and include all ethnic and economic groupings in their respective constituencies.

In the proceedings below, amicus curiae did not take a position on the basic substantive issue as to whether defendants' excessing system imposed discriminatory, unconstitutional burdens upon members of the plaintiff class. Rather, amicus curiae believed that the interests of the Court would best be served, and a unified stand of its membership could best be maintained, by limiting its involvement to providing relevant information to the Court concerning the workings of New York City's complex school decentralization system and attempting to insure that any relief under consideration be administratively feasible and consistent to the maximum degree possible with the powers and prerogatives of the Community School Boards under the New York Education Law.

The Association intends to maintain this limited role in its capacity as amicus curiae in the present appeal. Therefore, amicus curiae will not attempt to restate the basic facts which have been set forth by the parties or to argue before this Court the substantive Constitutional issues. We do believe it important, however, to briefly bring to the Court's

attention the implications of appellant Board of Education's alternative arguments for modification of the Order below and to clarify the fact that those provisions of the Order below which deal with "automatic appointment" of supervisors rather than with "excessing" are not being challenged by any of the parties to this appeal and therefore should not be vacated or modified even if some or all of the excessing provisions are reversed by this Court.

ARGUMENT

I APPELLANTS' ASSERTION THAT THE DISTRICT COURT ABUSED ITS DISCRETION IN APPLYING ITS "RACIAL QUOTA SYSTEM" ON A COMMUNITY DISTRICT LEVEL MISSTATES THE FINDINGS BELOW AND ITS SUGGESTED MODIFICATION COULD PROVE PREJUDICIAL TO THE INTERESTS OF THE COMMUNITY SCHOOL BOARDS.

Appellant Board of Education argues in Point II of its brief (pp. 40-43) that assuming arguendo that the District Court did not err in instituting a racial quota system, the Court abused its discretion in requiring each community school district to adhere to racial quotas, as well as the Central Board of Education on a city-wide basis.

Given the findings of the District Court, amicus curiae submits that the Order below had to be implemented on a community district level. Unless the District Court's evidentiary conclusions are reversed by this Court, modification of the Order to avoid intra-district quotas would be administratively

unfeasible and would substantially and unnecessarily undermine basic powers of the Community Boards under the New York State Education Law.

As has been repeatedly stressed by all the parties to this appeal, "excessing" refers in the New York City school system not only to lay-offs of pedagogical personnel but also to transfers or demotions which result when specific jobs are abolished for budgetary or other reasons. In the decentralized city school system, basic personnel decisions concerning the hiring, promotion, and discharge of supervisory personnel at the elementary and junior high school levels reside exclusively in the Community School Boards. N.Y. Ed. Law §2590-e.2, 2590-j.4(c), 2590-j.7. Community Boards, which have general authority to manage and operate the schools under their jurisdiction (N.Y. Ed. Law §2590-e, 2590-e.4), also retain basic budgetary responsibility which gives each of them the authority to schedulize funds (N.Y. Ed. Law §2590-i.8) and therefore to determine, within its available allocations, the number of positions which will be funded for each of its schools or organizational units and, consequently, which positions will be abolished in times of budgetary cut-backs.

If a Community Board finds it necessary to abolish a position, the supervisor holding that position will, in accordance with the C.S.A. seniority excessing rules (Brief for Appellant C.S.A. at p. 52) be permitted to "bump" a lower seniority supervisor serving in another location within the

community district, forcing the second supervisor into the city-wide "excess pool". This lower seniority supervisor may then be placed in an available vacancy in another community district, or, if no vacancy is available anywhere in the City, he may, if he is lowest in seniority on a city-wide basis, be lowered in rank or discharged (if he is not the lowest in city-wide seniority, he may "bump" lower seniority personnel in other districts and start the process all over again).

Plaintiffs maintained throughout the course of the proceedings below that a compulsory transfer to another position, even if no demotion or discharge is involved, represents a significant burden to which members of the Plaintiff class should not be disproportionately subjected. The Court below found for Plaintiffs on this point,specifically (70)*, and by direct implication in the definition of "excessing" set forth in the Order (398), and therefore provided plaintiffs with protection against transfers of position as well as against demotions or discharges. Appellant Board of Education may wish to assert in this appeal that the District Court's findings in this regard were against the weight of the evidence or are insufficient as a matter of law to justify a Constitutional claim (cf. Brief for Appellant C.S.A. at pp. 39-43). However, if the validity of the District Court's finding is accepted

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* Numbers in parentheses refer to pages in the Joint Index submitted in this appeal.

for purposes of the appeal, there is no basis for Appellants' claim that the extension of the Order to the community district level is an abuse of discretion. As indicated above, members of the plaintiff class cannot be protected against the burden of involuntary transfers except at the community district level where such transfers are initiated.

Amicus curiae takes no position concerning the factual finding that an involuntary transfer represents a constitutionally significant burden on members of the plaintiff class. The Association is greatly concerned, however, that this Court might be led by Defendant Board of Education's arguments to consider modifying the intra-district aspects of the Order below in a manner which would create significant additional administrative burdens for the Community School Boards and which might unnecessarily undermine their powers and responsibilities under state law.

One of Judge Tyler's major concerns in revising his original excessing Order of November 22, 1974 was to alleviate unnecessary problems for the Community School Boards (340-341). Under the original Order (327), ethnic ratios would have been computed only on a city-wide basis and therefore each Community Board would have been required to check with the Central Board's Office of Personnel and await the compilation of information from all 32 community districts before it could make any excessing changes within its local schools (298). This situation would have created inordinate delays and administra-

tive complexities and would have caused the Central Board's Executive Director of Personnel to assume many of the day-to-day personnel functions vested in Community School Boards under state law (299).

Realization of the unnecessary degree of interference with administrative management at the community district level led the attorneys for Appellant Board of Education to join with amicus curiae in requesting a modification of the original Order that would permit Community Boards to continue to administer intra-district excessing without central interference (334). Judge Tyler acceded to those requests in providing in the modified Order presently on appeal that the computation of ethnic proportions and implementation of the Order's protective provisions be done on a district-wide basis, instead of on a city-wide basis, in regard to initial intra-district personnel changes. We assume that Appellant Board of Education did not intend to change its position in this regard in this appeal; unfortunately, the phrasing of Point II of Appellant Board of Education's brief doesnot clearly advise this Court of the premises supporting the Board's argument in this regard on appeal. We believe, therefore, that all parties would agree that unless this Court is prepared to reverse the District Court's finding that an involuntary transfer constitutes an unconstitutional burden on members of the plaintiff class, the intra-district application of the Order below be left intact.

If this Court is inclined to consider whether there exists a more moderate form of a remedy which would rectify the effects of past discriminatory practices, we would bring to the Court's attention the District Court's draft proposal of October 15, 1974 (216), which was supported with minor modifications by plaintiffs and amicus curiae (231, 234). Under this approach, the burden of excessing upon members of the plaintiff class and others would have been mitigated by prohibiting all lay-offs or demotions and providing that compulsory out-of-district transfers would be temporary in nature, with all excessed supervisors being assured of a right to apply for permanent out-of-district vacancies of their choosing or to return to their home districts as soon as a vacancy became available.

In addition, the draft Order omitted any reference to racial quotas, and provided that the order of transfers and reassignments would be determined in alternate order from seniority order groupings of supervisors appointed before and after the date of the original injunction in this case. Defendants objected to this proposal largely because of alleged cost considerations (244), but defendants' own earlier assertions of the extent to which numerous new supervisory vacancies constantly become available in the system (93, 128) indicate that almost all supervisors could be reassigned to vacancies on a temporary or permanent basis. Therefore, few, if any, supervisors would impose a financial burden on the system by

drawing salary without serving in a specific assignment.

II THE "AUTOMATIC APPOINTMENT" PROVISIONS OF THE ORDER BELOW HAVE NOT BEEN CONTESTED BY THE PARTIES AND SHOULD BE AFFIRMED BY THIS COURT EVEN IF THE "EXCESSING" PROVISIONS OF THE ORDER ARE REVERSED OR MODIFIED

In addition to the excessing provisions which are at issue in this appeal, paragraph IIC of the Order below (400) mandates a procedure for permanent appointment of supervisors who had been serving in an acting capacity pursuant to the original injunction of the District Court. Plaintiffs had requested below that supervisors who had been licensed pursuant to the interim licensing procedures of Judge Mansfield's Final Judgment of July 12, 1973 be deemed "automatically appointed" on a permanent basis to the positions in which they had been acting. Amicus curiae strongly objected that such automatic appointment would directly contravene appointment powers of the Community Boards under the State Education Law, would create serious administrative problems, and was not contemplated by Judge Mansfield's prior orders. Judge Tyler, recognizing both the validity of amicus curiae's legal arguments and plaintiff's concern that newly licensed supervisors not be left indefinitely in an acting position if appointing authorities could not quickly come to a decision on their permanent status, fashioned a compromise remedy which is contained in paragraph

IIC. This provision grants appointing authorities a forty-five day period after licensure to act to grant or deny permanent appointment; failure of the appointing authority to act within the requisite period would be deemed to constitute an automatic appointment.

The 45-day appointment provisions are completely severable from the excessing issues being contested in this appeal. As indicated in the record, the automatic appointment question was perceived below by the Court and by the parties as being a separate issue (351-353). For purposes of convenience and to avoid the necessity of issuing a separate order, Judge Tyler appended the 45-day mechanism dealing with dates of appointment "for all purposes" to the provisions dealing with dates of appointment "for all purposes of implementing this Order".

If this Court should decide to reverse or modify the excessing provisions of the Order below, those provisions of paragraph IIC dealing with appointment of recently licensed supervisors which have not been challenged by any of the parties in this appeal should clearly be severed and continued intact.

CONCLUSION

For all the aforesaid reasons, this Court should not modify or reverse the Order below in a manner which would detrimentally affect the legal powers of the Community School Boards.

Respectfully submitted,

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Dated: May 30, 1975

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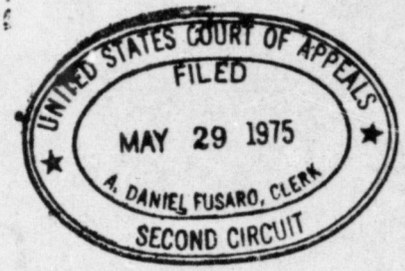

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- and -	AFFIDAVIT OF SERVICE
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- and -	
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STATE OF NEW YORK)
)ss.:
COUNTY OF NEW YORK)

SHERRY E. TEITELBAUM, being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at 71 Atlantic Avenue, Brooklyn, New York.

On May 29, 1975, deponent served the within brief upon Deborah Greenberg, Esq.,Attorney for Plaintiffs-Appellees in this action, at 10 Columbus Circle, New York, New York 10019; upon W. Bernard Richland, Esq.,attorney for Defendant-Appellant in this action, at Municipal Building, New York, New York 10007;

upon Frankle & Greenwald, Esqs., attorneys for Intervenor-Appellant, at 80 Eighth Avenue, New York, New York 10018; and upon Kaye, Scholer, Fierman, Hays & Handler, Esqs., attorneys for Defendant in this action, at 425 Park Avenue, New York, New York, the addresses designated by said attorneys for that purpose by depositing two true copies of same enclosed in a post-paid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Sherry E. Teitelbaum

Sherry E. Teitelbaum

Sworn to before me on this
29th day of May, 1975.

Notary Public

RICHARD FISCHBEIN
NOTARY PUBLIC, State of New York
No. 31-4500784
Qualified in New York County
Commission Expires March 30, 1977

NOTICE OF ENTRY

Sir:- Please take notice that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

Attorney for

Office and Post Office Address

To

Attorney for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19
at M.
Dated,

Yours, etc.,

Attorney for

Office and Post Office Address

To

Attorney for

DOCKET NO. 75-7161
~~INDEX NO.~~ Year 1975

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To Clerk, United States Court of Appeals

Attorney for

Service of a copy of the within

is hereby admitted.

Dated,

.....

Attorney for